

Federal Court



Cour fédérale

**Date: 20170116**

**Docket: T-2566-14**

**Citation: 2017 FC 45**

**Ottawa, Ontario, January 16, 2017**

**PRESENT: The Honourable Madam Justice Kane**

**BETWEEN:**

**VINCENZO DEMARIA**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Applicant, Vincenzo DeMaria, seeks judicial review of a decision rendered by the Appeal Division of the Parole Board of Canada (the Appeal Division) on November 14, 2014. The Appeal Division affirmed the decision of the Parole Board of Canada (the Board) rendered on June 18, 2014, to revoke Mr. DeMaria's full parole.

I. Overview

[2] The Board determined that Mr. DeMaria violated a condition of his parole which prohibits him from associating with any person known to be involved in criminal activity (the non-association condition). Specifically, the Board found that Mr. DeMaria associated with persons involved in Traditional Organized Crime (TOC) when he attended two family weddings on February 25, 2012 and on June 23, 2012. As a result, the Board found that permitting him to serve his sentence under supervision in the community would pose an undue risk to public safety and revoked his full parole. The Appeal Division affirmed the revocation.

[3] Mr. DeMaria argues that the Appeal Division erred in finding that the Board met its duty of procedural fairness. Mr. DeMaria notes that the Board refused to provide additional disclosure of the information it relied on, refused his request for a third postponement of his parole review, and refused to hold an oral hearing. Mr. DeMaria submits that the refusals, individually and collectively, breached the duty of procedural fairness owed to him.

[4] For the reasons that follow, the application is allowed.

[5] It is important to first highlight that the Parole Board has the responsibility and expertise to make decisions regarding parole and its revocation. This application for judicial review does not address the merits or reasonableness of the Board's decision with respect to the risk to public safety posed by Mr. De Maria; rather, it focuses only on the duty of procedural fairness owed by the Board to Mr. DeMaria in the Board's decision making process.

[6] The scope of the duty owed by the Board to Mr. DeMaria is informed by the relevant context, including that Mr. DeMaria's liberty interests, albeit limited or qualified, were at stake, his credibility was impugned, and the Board denied his request for a further postponement of his parole review and proceeded to make a decision without his full submissions in response. In these circumstances, the Board's refusal to hold an oral hearing resulted in a breach of procedural fairness.

[7] Mr. DeMaria had pursued a range of legal options, some of which he acknowledged to be strategic or tactical, which affected his ability to respond to the numerous allegations related to his parole review and prompted his requests for postponement of the review. Despite this, Mr. DeMaria was still owed a duty of procedural fairness by the Board.

[8] As explained below, if the Board had granted the third postponement to allow some additional time for Mr. DeMaria to make more comprehensive submissions in response to the numerous allegations, the context would have been different and an oral hearing may not have been required in order to meet the duty of procedural fairness.

[9] The Appeal Division erred in finding that the Board met the duty of procedural fairness owed to Mr. DeMaria. Therefore, the Board must re-determine whether Mr. DeMaria's parole should be revoked.

II. The Background

[10] Mr. DeMaria was convicted of second degree murder in 1982 and is serving a life sentence. He was granted day parole in 1989 and full parole in 1992. He had been living in the community, with conditions, until his parole was suspended in 2013.

[11] Mr. DeMaria was arrested on November 14, 2013, based on information gathered by the Correctional Service of Canada (CSC) that he had violated a condition of his parole. CSC interviewed Mr. DeMaria on November 18, 2013, and referred his suspension to the Parole Board, along with an Assessment for Decision (the Assessment).

[12] The Assessment recommended that his parole be revoked. The Assessment noted that CSC was in possession of “an abundance of compelling police information” indicating that Mr. DeMaria was actively involved in TOC and had violated the non-association condition of his parole. No details of this police information were disclosed to Mr. DeMaria at that time.

[13] Mr. DeMaria’s representative advised the Board on December 18, 2013, and January 17, 2014, that Mr. DeMaria intended to rebut the allegations and requested disclosure of the police information.

[14] CSC completed a Security Intelligence Report (SIR) on January 20, 2014. The full contents of the SIR were withheld from Mr. DeMaria pursuant to subsection 141(4) of the *Corrections and Conditional Release Act*, SC 1992, c 20 (the Act). However, CSC provided a

summary to him on January 21, 2014, in Memo #9, which is also referred to as the “Gist of Assessment for Decision 2013/12/06”.

[15] On February 4, 2014, Mr. DeMaria’s representative requested further disclosure from the Board and inquired whether Mr. DeMaria would be granted an oral hearing.

[16] On February 17, 2014, the Board responded that no further disclosure would be provided prior to the parole review and that it would assess whether meaningful disclosure had been provided at the point of reviewing the file. The Board also confirmed that the review would proceed on the basis of the written record.

[17] Between February 18, 2014, and the Board’s decision on June 18, 2014, Mr. DeMaria made three requests for a postponement of his parole review pursuant to subsection 135(5) of the Act. Postponements were granted on February 21, 2014, and on May 13, 2014. The Board indicated in the May 13, 2014 postponement decision that the review was scheduled to take place no later than June 16, 2014. On June 11, 2014, Mr. DeMaria’s representative requested a third postponement noting the pending outcome of a *habeas corpus* application before the Ontario Superior Court and its potential impact on the parole review, the complexity of the issues, and the need for more time to prepare submissions in response to the many allegations in Memo #9. On June 13, 2014, the Board denied the request for a third postponement.

[18] On June 17, 2014, Mr. DeMaria's representative provided the Board with limited written submissions, along with the record in the *habeas corpus* application before the Ontario Superior Court. The submissions focussed on procedural fairness issues.

[19] On June 18, 2014, the Board issued its decision, revoking Mr. DeMaria's full parole.

### III. The Decision Under Review

[20] Although the decision under review is that of the Appeal Division, the Court must consider the underlying decision of the Parole Board. As noted by Justice Letourneau in *Cartier v Canada (Attorney General)*, 2002 FCA 384 at para 10:

The judge in theory has an application for judicial review from the Appeal Division's decision before him, but when the latter has affirmed the Board's decision he is actually required ultimately to ensure that the Board's decision is lawful.

This is particularly important given that allegations of procedural unfairness focus on the Parole Board's proceedings.

#### *The Decision of the Parole Board*

[21] The Board found that Mr. DeMaria had violated the non-association condition of his parole and that permitting him to serve his life sentence in the community would pose an undue risk to society.

[22] The Board relied on Mr. DeMaria's CSC file information, including the Assessment, the SIR, and Memo #9. The Board also considered the June 17, 2014 written submissions by Mr. DeMaria's representative, Ms. Orkin. The Board acknowledged the documents provided regarding the *habeas corpus* application, but found that these did not address the reasons for the suspension of full parole.

[23] With respect to Mr. DeMaria's submissions that the Board had violated his right to procedural fairness, the Board concluded that:

- i. The refusal to grant a third postponement of Mr. DeMaria's parole review did not breach procedural fairness. Given that two previous postponements had been granted, he had ample time to respond to any adverse allegations before the Board.
- ii. The disclosure provided was adequate. The summary provided in Memo #9, and in the short follow-up memo dated February 13, 2014, contained sufficient details of the violations of his non-association condition.
- iii. An oral hearing was not required. The Board noted that subsection 140(2) of the Act provides that it may hold an oral hearing, but concluded that it had received "all relevant, persuasive, and reliable information required for it to render a decision" by way of the written record, including the information provided by CSC and Mr. DeMaria's submissions.

[24] With respect to whether Mr. DeMaria's continued parole would constitute an undue risk to society, the Board found that the information provided by numerous police agencies was

reliable and persuasive. The Board specifically noted that Mr. DeMaria attended two family weddings in 2012, police observed known members of TOC in attendance at those weddings, and that Mr. DeMaria had the opportunity to advise his parole supervisor that he had been in the company of these individuals, but did not. The Board found that this information was relevant to the risk posed by Mr. DeMaria.

*The Decision of the Parole Board Appeal Division*

[25] In support of his appeal, Mr. DeMaria's representative and counsel, Ms. Orkin, made extensive submissions dated August 18, 2014, which included several affidavits. The submissions provided a chronology of CSC decisions with respect to Mr. DeMaria's various grievances and legal challenges and made detailed arguments on the three procedural fairness issues. Mr. DeMaria's affidavit describes, among other things, his post-suspension interview, his practice of reporting contacts with individuals to his parole officer, the notice he provided to his parole officer of his intention to attend the weddings in February and June 2012, his recollection of the weddings, and his denial that he associated with the named individuals. Mr. DeMaria's affidavit also addresses several other allegations set out in Memo # 9, including about his business interests and his links to other named individuals.

[26] This information was not part of the record before the Board and was, therefore, not considered by the Appeal Division. The Appeal Division focussed only on the allegations of breach of procedural fairness.



[27] The Appeal Division concluded:

- i. The Board's decision to deny Mr. DeMaria a third postponement of his file review was reasonable. Given the length of time between his parole suspension and the Board's decision (212 days), he had ample time to respond to adverse allegations before the Board. In addition, his right to be heard was respected because his June 17, 2014 submissions were considered by the Board.
- ii. Mr. DeMaria's argument that the summary of the information set out in Memo #9 did not provide adequate disclosure was without merit. The Board provided a summary that included sufficient details such as dates, locations and names.
- iii. The Board's decision to deny Mr. DeMaria's request for an oral hearing was reasonable. Subsection 140(2) of the Act gives the Board discretion to determine whether an oral hearing is necessary. The Board reasonably concluded that it had all the information necessary to make a decision in the matter. In accordance with the Decision-Making Policy Manual for Board Members (the Policy Manual) at subsection 11.1(5), unless a hearing is otherwise required by law, the Board may choose to conduct a hearing based on an assessment of any relevant factor, including the reliability and persuasiveness of the information, incompleteness of the information, or an offender's inability to communicate.

#### IV. The Issues

[28] Mr. DeMaria submits that the Appeal Division erred in finding that the Board met its duty of procedural fairness. He submits that he was prejudiced in his response to the allegations

against him by a lack of disclosure, lack of sufficient time to prepare his submissions, and the Board's refusal to hold an oral hearing.

[29] The Respondent submits that the Appeal Division did not err in finding that the Board met its duty of procedural fairness. Mr. DeMaria knew the allegations against him with sufficient detail and had ample time to respond but chose not to address the substance of the allegations. As such, no oral hearing was required.

[30] The Court on judicial review must focus on the decision of the Board to determine whether the Board breached the duty of procedural fairness it owed to Mr. DeMaria in the circumstances by: not providing additional disclosure of the allegations; refusing to grant a third postponement of Mr. DeMaria's parole review; and / or, not convening an oral hearing to permit Mr. DeMaria to respond to the allegations.

#### V. The Standard of Review

[31] There is no disagreement that the issue of whether the Applicant was afforded procedural fairness is reviewed on the standard of correctness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). If a breach is found, a re-determination is generally required, unless the outcome would be inevitable (*Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 and *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643).

VI. Did the Parole Board breach its duty of procedural fairness by not providing additional disclosure of the allegations?

*The Applicant's Submissions*

[32] Mr. DeMaria submits that the Board erred in concluding that Memo #9 contained sufficient details to allow him to know the case to meet, and the Appeal Board erred in not so finding.

[33] Mr. DeMaria notes that Memo #9 set out many allegations, including that he was implicated in various criminal investigations and activities dating back to 2001. He submits that Memo #9 refers to several other individuals, but lacks details and context with respect to his alleged involvement with these individuals and this lack of detail prevented him from fully responding to the allegations.

[34] Mr. DeMaria argues that he had no way of knowing that the Parole Board would focus and rely on his attendance at two weddings to conclude that he breached his non-association clause and to revoke his parole. He adds that even with respect to the two weddings, Memo #9 did not state whether he was observed in proximity or speaking with the named individuals or how he “associated” with these individuals.

[35] He also argues that all the information in Memo #9 was considered by the Board. The Board found that the information, including that which came from several police agencies, to be

reliable and persuasive. This was not limited to the two weddings. He submits that he should have been provided with the details of all the allegations.

[36] Mr. DeMaria further submits that the Board applied the incorrect legal test for withholding information. Paragraph 141(4)(b) of the Act exempts the Board from disclosing information that the Board believes, on reasonable grounds, *would* jeopardize the safety of any person, the security of a correctional institution, or the conduct of any lawful investigation. He argues that the Board incorrectly applied a lower threshold—that the information *could* jeopardize the safety of any individual or the conduct of a lawful investigation. He notes that the Parole Board did not address whether it had reasonable grounds to believe any of the three criteria were met. There was no risk of jeopardizing a lawful investigation because all the information in the Memo was historical or “old news” and he was not asking for the names of confidential informants.

#### *The Respondent's Submissions*

[37] The Respondent submits that the Board complied with section 141 of the Act. Memo #9 provided a comprehensive summary with sufficient details to permit Mr. DeMaria to respond to the information relied on by the Board. The information that was not disclosed to Mr. DeMaria was not relied on.

[38] The Respondent adds that the Board did not err by withholding the SIR because it contained sensitive information provided by confidential informants pertaining to ongoing

investigations. In addition, the redacted SIR provided as part of the CTR in April 2016 demonstrates that the summary was very comprehensive.

[39] The Board focused its decision on Mr. DeMaria's attendance at two family weddings and all the relevant details of those events were provided in Memo #9. Although the summary does not state whether he spoke to the particular individuals, this information was within Mr. DeMaria's own knowledge.

[40] The Respondent notes that Mr. DeMaria responded to the allegations in Memo #9 at the appeal stage in August 2014, which demonstrates that he had sufficient details. The Respondent adds that Mr. DeMaria had the opportunity to make the same submissions to the Board but declined to do so.

**The Board did not breach procedural fairness by refusing additional disclosure.**

[41] The purpose of disclosure is to allow the affected person to know the case to be met and to have the opportunity to respond (*Mymryk v Canada (Attorney General)*, 2010 FC 632 at paras 16, 31 [*Mymryk*]).

[42] Subsection 141(1) of the Act states that the Board shall provide the offender with information that is to be considered in the review of the case or a summary of that information. In *Gough v National Parole Board*, [1991] 2 FC 117 at para 18 [*Gough*], the Court noted that "what is required is enough detail to allow the individual to answer the allegation." In *Mymryk*

(at para 17), the Court reiterated that “fundamental justice requires the Board to provide the offender with details of the relevant information upon which it will base its decision.”

The Board stated that the provisions of the Act were complied with and that other information was withheld because its disclosure *could* jeopardize the safety of an individual or the conduct of a lawful investigation. Although Mr. DeMaria argues that the Board applied the incorrect test and the lower threshold of “could,” meaning a possibility, rather than “would,” meaning a probability, the Board observed the requirements of subsection 141(1). Although the Board used wording that does not reflect the precise wording of subsection 141(4), a comparison of Memo #9 and the redacted SIR provided as part of the CTR demonstrates that the summary in Memo #9 was comprehensive and provided sufficient details.

[43] Memo # 9 set out a wide range of information dating back to 2001, including information about possible TOC associates, Mr. DeMaria’s businesses, his family members’ businesses, law enforcement investigations for fraud, drug trafficking and violent crime involving several other individuals, and other information suggesting that Mr. DeMaria was implicated in some of these investigations. Memo #9 was not limited to Mr. DeMaria’s attendance at two weddings.

[44] At the time that Mr. DeMaria was required to respond to the allegations and when he requested further disclosure between January and June 2014, he was not aware that the Board would base its decision on his attendance at two weddings. However, Memo # 9 included sufficient details to permit Mr. DeMaria to respond to all the allegations, not simply those related to the two weddings.

[45] There was no breach of procedural fairness arising from providing only the summary of the relevant information.

VII. Did the Parole Board breach its duty of procedural fairness by refusing to grant a third postponement of Mr. DeMaria's parole review?

*The Applicant's Submissions*

[46] Mr. DeMaria submits that, absent a compelling reason to deny his request, the duty of fairness required the Board to grant a third postponement of his parole review. The Board failed to consider the reasons for the postponement and simply concluded that he had had sufficient time to respond to the allegations.

[47] Mr. DeMaria argues that the denial of the postponement thwarted his ability to make comprehensive submissions in response to the numerous allegations set out in Memo #9. As explained in the June 11, 2014 letter from his representative and counsel, Ms. Orkin, the issues were complex, the file to review was voluminous, other legal proceedings (including his *habeas corpus* application) were pending—potentially impacting on his parole review—and all these matters required the attention of his counsel. Ms. Orkin candidly explained that she lacked sufficient time to prepare full submissions due to the competing demands on her time and the difficulty she had in communicating with Mr. DeMaria while he was in custody, noting an ongoing lockdown at the Collins Bay Institution. Even if it were a tactical decision on Mr. DeMaria's part to pursue a *habeas corpus* application for relief not provided in other processes or grievances, he submits that the Board failed to consider the reasons cited to support his need for a postponement.

[48] Mr. DeMaria also notes that the letter from Ms. Orkin proposed two alternatives: (i) postponement until after his *habeas corpus* application was determined or (ii) postponement until September 15, 2014, to permit Ms. Orkin to make comprehensive submissions in response to Memo #9.

[49] Mr. DeMaria submits that a balance must be struck between the Board's claimed duty to make a parole review decision expeditiously and its obligation to provide a fair hearing and to consider all the information. Postponing the review did not prejudice the Board, given that Mr. DeMaria remained in custody, but the Board's refusals to provide additional disclosure, to postpone and to hold an oral hearing, prejudiced him.

#### *The Respondent's Submissions*

[50] The Respondent submits that the Board has the discretion to postpone or adjourn a review. The Court cannot revisit the reasonable exercise of discretion.

[51] The Respondent argues that the denial of the third postponement did not prejudice Mr. DeMaria's right to make full answer and defence. The Respondent notes that from the time Mr. DeMaria was provided with Memo #9 he had almost five months to respond to the allegations, but he did not do so. Instead, he raised several questions and pursued other legal proceedings.

[52] The Respondent also submits that the reasons advanced for the postponements in February, May, and June changed. Mr. DeMaria based his request for a third postponement on



his pending *habeas corpus* application before the Superior Court of Ontario. The Board had no obligation to accommodate the collateral proceeding (*Prasad v Canada (Minister of Employment and Immigration)*), [1989] 1 SCR 560 at 571-72). Moreover, the Board was aware that the jurisprudence had established that the provincial superior courts do not have jurisdiction to hear this type of *habeas corpus* application because the Act provides a complete procedure for the review of the Parole Board's decision:

[53] The Respondent argues that the Board had a duty to proceed with the parole review expeditiously.

**The Parole Board's decision to deny the postponement together with its refusal to hold an oral hearing resulted in a breach of procedural fairness**

[54] Subsection 135(5) of the Act provides that upon referral, the Board *shall* review the case and make a decision "within the period prescribed by the regulations unless, at the offender's request, the review is adjourned by the Board or is postponed by a member of the Board or by a person designated by the Chairperson by name or position".

[55] Subsection 163(3) of the *Corrections and Conditional Release Regulations*, SOR/92-620 [the Regulations] states that "unless an adjournment is granted by the Board at the offender's request, the Board shall render its decision within 90 days after the date of the referral..."

[56] Therefore, the Board is generally required to make its decision within 90 days of the referral, unless the offender requests an adjournment or postponement and the Board exercises its discretion and grants the request.

[57] Although the Respondent submits that there is a duty on the Board to make a final determination regarding a parole suspension expeditiously, the Act and the Regulations clearly contemplate requests by an offender for adjournments or postponements.

[58] As the Respondent acknowledges, there are no criteria to guide the Board in exercising its discretion to grant a postponement. The Policy Manual at section 11.7 provides some guidance regarding when and why an offender may request a postponement, but these are examples only and are not exhaustive.

[59] In addition, at subsection 11.7(9), the Manual provides:

9. When the Board agrees to postpone a detention or post-suspension review, the review must be completed within the timeframes established in the CCRR, unless the offender requests a longer postponement and understands that no release will occur prior to the Board making a final decision.

[60] In the present case, Mr. DeMaria requested a longer postponement and he was well aware that he would not be released prior to any decision.

[61] As with any exercise of discretion, including that conferred by statute, it must be reasonable and respect procedural fairness (*Re: Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at paras 37-39).

[62] The Respondent submits that the reasons cited for the requested adjournments changed over time, and to some extent, this is true. However, the reasons advanced by Ms. Orkin on behalf of Mr. DeMaria were not inconsistent. Moreover, the Board did not address the several reasons cited by Ms. Orkin or the alternatives she proposed. The Board referred only to the pending *habeas corpus* proceeding and concluded that Mr. DeMaria had had ample time to respond to the assertions that led to the parole suspension.

[63] The Board also noted, “[y]our assistants have provided a number of letters on your behalf in which you deny the accuracy of the information provided by police or CSC to the Board.” However, these letters were not submissions in response to Memo # 9.

[64] The Appeal Division found that the Board’s decision to not postpone was reasonable given the length of time between Mr. DeMaria’s parole suspension and the Board’s decision. The Appeal Division noted that Mr. DeMaria’s June 17, 2014 submissions were considered by the Board and found that his right to be heard was respected. However, these submissions were limited to procedural fairness issues.

[65] As noted above, Memo #9 included numerous allegations and it was in Mr. DeMaria’s interests to respond to all the information and allegations in Memo # 9, much of which was quite dated.

[66] There was no prejudice to the Board by postponing the parole review. The Respondent’s suggestion that the duty to make an expeditious decision on a parole review guards against

allegations of unlawful detention is unpersuasive. Mr. DeMaria was in detention when he requested the postponements. He or other applicants would not likely succeed in arguing that their own request to remain in custody until a later date for their parole review could be scheduled constitutes unlawful detention.

[67] On one hand, Mr. DeMaria did have five months (not 212 days as the Appeal Board noted) from the receipt of Memo #9 to make substantive submissions in response. He was granted two postponements. He posed extensive questions to the Board seeking additional information. He also chose to simultaneously pursue collateral proceedings in the Ontario Superior Court. On the other hand, he was not aware that the Board would focus on his attendance at two weddings, rather than on all the allegations which date back more than a decade. He reiterated his requests for further disclosure, postponements, and an oral hearing. His counsel, Ms. Orkin, set out several reasons for the third postponement request, including that the issues were complex, Mr. DeMaria's file was voluminous, that she had difficulty communicating with him at the Collins Bay Institution, particularly due to an ongoing lockdown, that she was pulled in two directions in terms of preparing documents, and that she needed at least until September to provide submissions to the Board. The Board did not address the several reasons cited in Ms. Orkin's letter or the alternatives she proposed, nor did it identify any possible prejudice to the Board in postponing the parole review given that Mr. DeMaria remained in custody.

[68] Instead, the Board found that Mr. DeMaria had ample time to respond and that Ms. Orkin's previous letters, which the Board found to be denials of the accuracy of the information,

were sufficient. However, the letters referred to by the Board posed numerous questions and were not the response to the allegations. The Board was well aware that submissions in response to the allegations had not yet been provided.

[69] Similarly, the Appeal Division's finding that the Board had considered the June 17, 2014 submissions missed the point that these submissions were only on the procedural fairness issues and were not responsive to the allegations.

[70] While the Appeal Division may have erred in finding that the Board reasonably exercised its discretion to refuse the postponement, it is the Board's refusal to postpone the hearing followed by the Board's refusal to convene an oral hearing, as explained below, which resulted in a breach of procedural fairness.

VIII. Did the Parole Board breach its duty of procedural fairness by not convening an oral hearing to permit Mr. DeMaria to respond to the allegations?

*The Applicant's Submissions*

[71] Mr. DeMaria submits that an oral hearing was required because the Board's decision to revoke his parole involved determinations of credibility and significantly affected his liberty.

[72] Mr. DeMaria submits that in *Joly v Canada (Attorney General)*, 2014 FC 1253 at para 79 [*Joly*], the Court found that when the review of a parolee's suspension involves issues of credibility and a potentially lengthy period of re-incarceration is at stake, an oral hearing is required. He argues that the same principle should apply to his circumstances.

[73] He submits that Memo #9 made allegations about his credibility. In addition, several of the allegations in Memo #9 were based on the assertions of confidential informants, the reliability and completeness of which should have been tested in an oral hearing.

[74] Mr. DeMaria also notes that subsection 140(2) of the Act, which now gives the Board the discretion to hold oral hearings, rather than requiring an oral hearing for such reviews, was declared unconstitutional by the Quebec Superior Court in *Way c Commission des libérations conditionnelles du Canada*, 2014 QCCS 4193 [Way].

[75] Mr. DeMaria submits that regardless of the statutory provisions, the common law requires that the Board meet its duty of procedural fairness and that the scope or content of the duty is guided by the factors established in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [Baker]. He submits that the Board owed him a higher degree of procedural fairness, including an oral hearing.

#### *The Respondent's Submissions*

[76] The Respondent notes that subsection 140(2) of the Act gives the Board discretion to conduct an oral hearing and this discretion should not be interfered with lightly (*Cougar Aviation Ltd v Canada (Minister of Public Works and Government Services)*, [2000] FCJ No 1946 at para 62 (CA); *Xwave Solution Inc v Canada (Public Works and Government Services)*, 2003 FCA 301 at para 13).

[77] The Respondent submits that the Appeal Division correctly found that, in accordance with the guidance set out in the Policy Manual, the Board may choose to conduct a hearing based on an assessment of any relevant factor, including the reliability and persuasiveness of the information, incompleteness of the information or an offender's inability to communicate.

[78] The Respondent further submits that it falls to the offender to demonstrate to the Board that an oral hearing is required and that Mr. DeMaria did not do so. It was, therefore, reasonable for the Board to conclude that it had all the necessary information before it and to treat the police information as reliable given the absence of contradictory evidence. Mr. DeMaria's strategic decision to not address the substance of the allegations left the Board without any challenge to the completeness or the reliability of the information. Had he made submissions in response to the allegations that challenged the completeness of the information or its reliability, the Board may have held an oral hearing.

[79] The Respondent agrees that liberty is an important interest, but submits that it is not dispositive of the need for an oral hearing (*Baker; Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 [*Suresh*]). The Respondent submits that four out of five *Baker* factors demonstrate that procedural fairness did not require an oral hearing in this particular context. The non-judicial character of the Board, the statutory provisions, the Board's ability to choose its own procedure, and the appeal remedies, all point to a more minimal duty of procedural fairness, not requiring an oral hearing.

[80] The Respondent notes that Mr. DeMaria's parole suspension was referred to the Board for consideration and a decision, he was advised it would be a paper review, he received a comprehensive summary of the allegations in Memo #9, and he had two postponements at his request. Mr. DeMaria chose not to engage with and respond to the allegations. He made only limited submissions in response, which did not address the substance of the allegations and, as a result, the Board was entitled to rely on the information in Memo #9, which it found to be reliable and persuasive. In this context, the Board met its duty of procedural fairness.

**The Parole Board's refusal to hold an oral hearing, following its refusal to postpone the parole review, was procedurally unfair**

*Credibility and liberty interests were at stake*

[81] The decision to revoke Mr. DeMaria's parole engaged his section 7 *Charter* rights. This, along with other factors, affects the scope of the duty of procedural fairness.

[82] Although Mr. DeMaria is serving a life sentence, he had been granted full parole. There is a marked difference between serving a life sentence in custody and serving that sentence under supervision in the community. His limited or qualified liberty interests must be considered with this distinction in mind.

[83] In *Hewitt v Canada (National Parole Board)*, [1984] 2 FC 357 (TD), the Court noted (at 367) that "[t]he applicant still has the right not to have been deprived of his highly qualified liberty – which is parole – except in accordance with the principles of fundamental justice." In *Gough*, at para 15 the Court also addressed the liberty interests of parolees noting:



There is no doubt that the applicant's liberty is conditional [...] At the same time, there can be little doubt that the applicant's conditional liberty interest, in this case, is at the high end of the spectrum [...] The applicant is on full parole and has been for many years [...] An individual's liberty (even the conditional liberty which a parolee enjoys) weighs very heavily in the scales when compared to competing interests.

[84] In *Singh et al v Minister of Employment and Immigration*, [1985] 1 SCR 177 [*Singh*], the Supreme Court of Canada emphasized that when section 7 is engaged and the credibility of the person affected is a central issue, an oral hearing is generally required, noting at 213-214:

I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing [...] I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.

[85] Mr. DeMaria's credibility was also clearly at issue.

[86] Memo #9 includes a range of information dating back to 2001 about Mr. DeMaria's connections to organized crime; his business dealings; investigations of other individuals regarding fraud, drug trafficking, and violent crime; along with more recent information. Memo #9 suggests that Mr. DeMaria is linked to these individuals and includes several negative statements about his credibility.

[87] Although the Respondent submits that the Board's decision is based exclusively on Mr. DeMaria's breach of the non-association clause at the two weddings, the Board relied on the

negative credibility statements in Memo #9 and made its own findings of credibility. The information in Memo #9 went well beyond the two weddings.

[88] Memo #9 made several references to Mr. DeMaria's credibility, including:

- With respect to whether Mr. DeMaria's statement that he did not recall seeing a particular person at the June 2012 wedding and did not report this to his parole officer, the memo states, "...this raises concerns about DEMARIA's credibility and reliability in following his conditions..."
- With respect to information dating back to 2003 and his contact with Mr. Cortese, which Mr. DeMaria stated may have been at an earlier wedding (characterized as a historical breach), the memo states, "[a]gain, this raises concerns about DEMARIA's credibility and his inability to be forthright..."
- With respect to other historical information, including alleged contacts with other individuals and Mr. DeMaria's business dealings, the memo states, "DEMARIA has clearly not been forthright with his CMT...DEMARIA's credibility and reliability in following his conditions and reporting information to his CMT as required is questionable." In addition, "this historical information affirms the CMT's concern about the questionable credibility of DEMARIA."
- With respect to the fraud investigation of other individuals in 2003, the memo notes that "receipt of deposits resulting from an insurance fraud...represents further concerns about DEMARIA's credibility." With respect to a 2008 fraud investigation, again of other individuals, the memo adds that Mr. DeMaria's connection to these individuals is not

likely a coincidence, “which again raises the issue of DEMARIA’s questionable activities and overall credibility.”

- In the conclusion, the memo notes, “[t]he information provided by all sources presents a concerning pattern of DEMARIA being elusive and lacking credibility as there are too many inconsistencies between his self-reports and collateral information to consider them just coincidences... the CMT believes that... DEMARIA regularly demonstrates a lack of honesty and openness about his associations and activities, both historically and currently...”

[89] Although the Respondent submits that *Joly* is distinguishable and that Justice Diner’s summary of the common law with respect to oral hearings and procedural fairness in the context of a parole revocation decision is *obiter*, *Joly* is based on the principles previously established in the jurisprudence.

[90] Justice Diner found that the Board breached its duty of procedural fairness by not convening an oral hearing. The facts differ from the present case in that Mr. Joly’s parole review had commenced before the Act was amended to remove the requirement to convene an oral hearing and to give the Board discretion to convene an oral hearing. The determinative issue in *Joly* was the application of the transitional provisions of the Act, which entitled Mr. Joly to an oral hearing.

[91] Justice Diner went on to find that Mr. Joly’s rights to procedural fairness were also breached under the common law. Although this is an alternative finding, Justice Diner’s summary of the

common law, including his analysis of *Singh, Suresh, Baker and Charkaoui v Canada*, 2007 SCC 9 is sound. That jurisprudence continues to guide the determination of the duty of procedural fairness owed to offenders in similar circumstances.

[92] At paragraph 79, Justice Diner stated:

When credibility is at issue, as it is here, and a negative determination carries the consequence of a significant period of re-incarceration, procedural fairness should, at the very least, provide the Applicant with *an opportunity to relay his side of the story*.

[Emphasis added]

[93] Contrary to Mr. DeMaria's submission, Justice Diner's statement does not go so far as to establish that an oral hearing must be held where credibility and incarceration are at issue, only that an opportunity to "relay his side of the story" should be provided. This reflects the prevailing jurisprudence. Justice Diner found in the context of the case before him – noting that Mr. Joly did not make written submissions and expected that an oral hearing would be held – that an oral hearing was required to provide Mr. Joly with an opportunity to relay his side of the story.

[94] Mr. DeMaria faced further incarceration of a potentially indefinite duration and his credibility was challenged. The issue is whether the Board provided him with the opportunity to relay his side of the story.

*The statutory provision*

[95] Subsection 140(2) states only that the Board "may elect" to conduct the review "by way of hearing in any case not referred to in subsection (1)." The Appeal Division cited subsection

11.1(5) of the Policy Manual and found that it was reasonable for the Board to conclude it had all the information to conduct the review.

[96] Subsection 11.1(5) provides:

5. In cases where a hearing is not required by law, Board members may choose to conduct a review by way of a hearing, pursuant to subsection 140(2) of the CCRA, where they believe, under the specific circumstances of the case, that a hearing is required to clarify relevant aspects of the case. This may include where:

- a. the reliability and persuasiveness of the information being considered cannot be assessed on a file review;
- b. there is incomplete or discordant information on file, of relevance to the review, that could be clarified at a hearing; or
- c. information on file indicates that the offender has difficulties (cognitive, mental health, physical or other) that prevent them from communicating effectively in writing.

[97] The same Manual provides at subsection 11.1(2) that its purpose is “[t]o provide guidance to Board members on conducting quality hearings, *while complying with the duty to act fairly* and adhering to legislation, case law and policy” [Emphasis added].

[98] The Respondent submits that Mr. DeMaria did not establish that an oral hearing should be held. However, nothing in the Act, the Regulations or the Policy Manual suggests that it is up to the offender to establish or persuade the Board that a hearing should be held. The Policy Manual refers to “where a hearing is not required by law” and, as such, acknowledges that a hearing may be required by subsection 140(1), other statutory provisions or by the common law. Despite that subsection 140(2) provides the discretion to hold an oral hearing – and in the present circumstances there is no dispute that Mr. De Maria’s review falls within subsection 140(2) –

there were several factors pointing to the need for an oral hearing, in addition to the guidance in the Policy Manual.

*The Common law duty of procedural fairness*

[99] In *Baker*, above, the Supreme Court of Canada established that the duty of procedural fairness varies depending on the context.

[100] Justice L'Heureux Dubé provided a non-exhaustive list of factors and emphasized that the scope or content of the duty of procedural fairness must be determined in the specific context of each case. Justice L'Heureux Dubé reiterated that procedural fairness is based on the principle that individuals affected by decisions should have the opportunity to present their case and to have decisions affecting their rights and interests made in a fair and impartial and open process “appropriate to the statutory, institutional, and social context of the decision” (*Baker* at para 28).

[101] The factors include the nature of the decision, the nature of the statutory scheme, the importance of the decision to the person affected, the legitimate expectations of that person and the choice of procedure made by the decision maker.

[102] With respect to the nature of the decision and the process followed in making it, *Baker* guides that the more the process resembles judicial decision making, the more likely it is that procedural protections closer to the trial model will be required (*Baker* at para 23). Although the process followed by the Board in making parole decisions is more inquisitorial than adversarial, the Board must assess and determine the weight to attach to the evidence before it, and this often

involves assessments of credibility. In this case, the Board noted Mr. DeMaria's denials, but did not wait for his full submissions. Nonetheless, the Board made adverse credibility findings, relying on only documentary evidence.

[103] With respect to the nature of the statutory scheme, greater procedural protections will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted (*Baker* at para 24). In the present case, the Act provides for an appeal of a Parole Board decision. In addition, the decision of the Appeal Division may be the subject of an application for judicial review to this Court.

[104] The importance of a decision to the individuals affected is a significant factor affecting the content of the duty of procedural fairness. The more important the decision and the greater the impact on the persons affected, the greater the procedural protections required (*Baker* at para 25). The decision to revoke parole is of significant importance. As noted above, this is the difference between living in the community with conditions while still serving a life sentence and remaining in custody awaiting a possible future opportunity to have parole considered. Revocation of parole may also negatively impact any future applications for parole.

[105] The legitimate expectations of the person challenging the decision also affect what procedures the duty of fairness requires in given circumstances. If the person has a legitimate expectation that a certain procedure will be followed, the duty of fairness requires that procedure (*Baker* at para 26). Mr. DeMaria requested an oral hearing as early as January 2012, but the

Board clearly communicated in February 2012 that the review would proceed on the basis of written material.

[106] *Baker* also guides that the choice of procedure made by the decision-maker should be taken into account and respected, particularly when the statute leaves it to the decision-maker to choose its own procedure, or when it has an expertise in determining what procedures are appropriate in the circumstances (*Baker* at para 27). Subsection 140 (2) gives the Board discretion to determine whether to hold an oral hearing, unless a hearing is mandated, but does not include any criteria. The Policy Manual provides some guidance, and also reminds Board members of the duty to act fairly.

[107] The Respondent submits that four of five *Baker* factors support the view that the Board met the duty of procedural fairness owed in the overall context and that an oral hearing was not required. In my view, three of five factors support a higher degree of procedural fairness. Regardless, the scope of the duty of procedural fairness is not determined based on a tally of the favourable *Baker* factors. The factors are not exhaustive and some factors attract more weight than others. The *Baker* factors guide decision makers about the scope or content of the duty of procedural fairness; *i.e.*, what measures are called for to respect the principle that the person affected “should have the opportunity to present their case fully and fairly...” (*Baker* at para 28).

[108] In the present case, the nature of the decision and the manner in which the Board makes its decisions, coupled with the importance of the decision to Mr. DeMaria, supports the need for more than the minimum level of procedural fairness.



[109] In some contexts, the duty of fairness may be satisfied by way of a full and complete written hearing (*Baker* at paras 33-34), even when *Charter* rights are engaged (*Singh* at 213).

[110] The Board may have satisfied its duty of procedural fairness without holding an oral hearing if it had granted Mr. DeMaria's request to postpone his parole review and Mr. DeMaria had subsequently provided more comprehensive written submissions in response to the numerous allegations, rather than limited submissions on the procedural fairness issues. As noted by the Respondent, Mr. DeMaria's written submissions along with his own affidavit were submitted to the Appeal Division in August 2014, and responded to the substance of most of the allegations. However, the Parole Board had refused the third request for a postponement to permit such submissions two months previously. The Appeal Division considered the appeal, which was based on a breach of procedural fairness, only on the basis of the information on the record before the Board. The refusal of the Board on June 13, 2014, to postpone the review for the third time is, therefore, an important part of the relevant context that informs the scope of the duty of procedural fairness and whether an oral hearing was required.

[111] The relevant context also includes that Mr. DeMaria's liberty interests were at stake, his credibility was impugned, and he faced numerous allegations, which he believed he should respond to. As noted, he was not aware that the Board would base its decision on his attendance at two weddings.

[112] In the circumstances, following the refusal of the third postponement request, an oral hearing should have been provided to permit Mr. DeMaria to respond to the allegations and to

address the credibility findings in Memo #9. Alternatively, if a postponement had been granted for some reasonable period of time to permit Mr. DeMaria to provide his submissions in response to Memo #9 before the Board made findings regarding his credibility and the reliability and persuasiveness of the information, an oral hearing may not have been required to meet the duty of procedural fairness. As noted, the duty of procedural fairness varies with the context and if the postponement had been granted, the context would have been different.

[113] In the circumstances of this case, the Appeal Board erred in finding that the Board had met its duty of procedural fairness.

#### *Constitutionality*

[114] The constitutionality of section 140 is not the issue in the present case.

[115] In *Way*, above, the Quebec Superior Court found that amendments to paragraph 140(1)(d) of the Act, which removed the right to an oral hearing in some circumstances, violated section 7 of the *Charter* and cannot be saved by section 1. The Quebec Court of Appeal upheld this decision (*Canada (Procureur général) c Way*, 2015 QCCA 1576). Leave to appeal has been granted by the Supreme Court of Canada and will be heard in the New Year. That determination may clarify whether hearings shall be held in all or more circumstances. However, Mr. De Maria's application is granted on the basis of the breach of procedural fairness.

IX. Conclusion

[116] The application for judicial review is granted. The Appeal Division erred in finding that the Parole Board met its duty of procedural fairness in the particular circumstances of this case. As a result, a differently constituted panel of the Parole Board shall re-determine whether Mr. DeMaria's parole should be revoked after providing Mr. DeMaria with a reasonable opportunity to make written submissions in response to Memo #9 and / or following an oral hearing.

[117] This is not a situation where it can be found that the decision to revoke Mr. DeMaria's parole would be inevitable but for the breach of procedural fairness, nor did the Respondent argue that this was so.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

The application for judicial review is allowed.

A differently constituted panel of the Parole Board shall re-determine Mr. DeMaria's parole review in accordance with these reasons.

"Catherine M. Kane"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-2566-14

**STYLE OF CAUSE:** VINCENZO DEMARIA v ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** OTTAWA, ONTARIO

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